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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-650

STATE OF NEW MEXICO, R. LEE AAMODT, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, PUEBLO DE SAN ILDEFONSO,
PUEBLO DE POJOAQUE, PUEBLO DE NAMBE, PUEBLO
DE TESUQUE, *Respondents.*

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

MOTION OF FLATHEAD, MISSION, AND JOCKO VALLEY
IRRIGATION DISTRICTS FOR LEAVE TO FILE A BRIEF
AMICI CURIAE IN RESPONSE TO PETITION NO. 650.

AND

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI

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Irrigation Districts*

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**MOTION OF FLATHEAD, MISSION, AND JOCKO VALLEY
IRRIGATION DISTRICTS FOR LEAVE TO FILE
AS AMICUS CURIAE**

Pursuant to Rule 42 of the Supreme Court of the United States, the Flathead, Mission, and Jocko Valley Irrigation Districts ("the Districts") move this Court for leave to file the accompanying brief in this case as *amici curiae*.

The Districts are non-profit Montana corporations whose members are owners of lands within the exterior boundaries of the Flathead Indian Reservation in Montana. Accordingly, the individual Indian and non-Indian members of the Districts all trace their land titles with appurtenant water rights to the Confederated Salish and Kootenai Tribes of the Flathead

Indian Reservations ("the Tribes"); that is to say, they trace their title to the Tribes through the United States acting as trustee for the Indians pursuant to the Act of April 23, 1904, 33 Stat. 302, and amendments thereto, whereby certain Flathead Indian Reservation lands were required to be allotted to members of the Tribes and other such lands were opened to settlement and other disposition to non-Indians. Under the doctrine announced by this Court in *Winters v. United States*, 207 U.S. 564 (1908), upon creation of the Flathead Indian Reservation, Congress, which had the power to do so, by implication reserved appurtenant water rights necessary for irrigation. *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939). As successors-in-interest to some of these lands, the landowners comprising the Districts acquired appurtenant *Winters* doctrine water rights with a priority equal to the *Winters* rights appurtenant to lands allotted to individual Indians or retained by the Tribes. *United States v. Powers*, 305 U.S. 527 (1939), *aff'g* 94 F.2d 783 (9th Cir. 1938), *aff'g as modified*, 16 F. Supp. 155 (D. Mont. 1936).

The United States Court of Appeals for the Tenth Circuit below held that Congress intended that the Indians of the Pueblos also should have water rights. However, the Court of Appeals failed to recognize that such water rights, created by implication whenever the United States set aside or confirmed to Indians arid Western lands where water for irrigation was essential, *inhere in and run with the benefited lands*, so that when portions thereof are transferred to individual Indians or to non-Indians, proportionate *Winters* doctrine rights go with the land. This is the essential teaching of this Court's holding in *United States v.*

Powers, supra. The Court of Appeals accordingly erred in holding that Indian landowners in the Pueblos have appurtenant water rights superior in priority to the water rights of non-Indian landowners within the Pueblos who, pursuant to acts of Congress, acquired title to Pueblos lands with appurtenant water rights. In reaching this erroneous conclusion with respect to the relative priorities of Indians and non-Indians to water, the Court of Appeals neither discussed nor cited, and apparently did not even consider, the holding of this Court in *United States v. Powers, supra*. The error of the Court of Appeals on the important question of priorities as between Indians and non-Indians who claim rights as successors-in-interest to lands having appurtenant water rights is in conflict with the principle of the *Powers* case pursuant to which the members of the Districts claim their proportionate *Winters* doctrine water rights.

Neither the Court of Appeals nor any of the petitioners has alluded to the theory or the holding of this Court's controlling decision in *United States v. Powers, supra*. Accordingly, this motion should be granted to permit *amici curiae* to present a matter of controlling significance which is not being presented by the parties.

Respectfully submitted,

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December 9, 1976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

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BRIEF OF FLATHEAD, MISSION, AND JOCKO VALLEY
IRRIGATION DISTRICTS IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

I. INTEREST OF THE AMICI CURIAE

The Flathead Irrigation District, the Mission Irrigation District, and the Jocko Valley Irrigation District ("the Districts") are non-profit Montana corpor-

ations whose members are owners of lands within the exterior boundaries of the Flathead Indian Reservation in Montana. Accordingly, the individual Indian and non-Indian members of the Districts all trace their land titles with appurtenant water rights to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservations ("the Tribes"); that is to say, they trace their titles to the Tribes through the United States acting as trustee for the Indians pursuant to the Act of April 23, 1904, 33 Stat. 302, and amendments thereto, whereby certain Flathead Indian Reservation lands were required to be allotted to members of the Tribes and other such lands were opened to settlement and other disposition to non-Indians. Under the doctrine announced by this Court in *Winters v. United States*, 207 U.S. 564 (1908), upon creation the Flathead Indian Reservation, Congress, which had the power to do so, by implication reserved water rights necessary for irrigation. *United States v. McIntire*, 101 F.2d 650 (9th Cir. 1939). As successors-in-interest to some of these lands, the landowners comprising the Districts acquired appurtenant *Winters* doctrine water rights with a priority equal to the *Winters* rights appurtenant to lands allotted to individual Indians or retained by the Tribes. *United States v. Powers*, 305 U.S. 527 (1939), *aff'g* 94 F.2d 783 (9th Cir. 1938), *aff'g as modified*, 16 F. Supp. 155 (D. Mont. 1936).

The United States Court of Appeals for the Tenth Circuit held the the Congress intended that Indians of the Pueblos also should have water rights. However, the Court of Appeals failed to recognize that such water rights, created by implication whenever the United States set aside or confirmed to Indians arid Western lands where water for irrigation was essen-

tial, *inhere in and run with the benefited lands*, so that when portions thereof are transferred to individual Indians or to non-Indians, proportionate *Winters* doctrine rights go with the land. This is the essential teaching of this Court's holding in *United States v. Powers, supra*. The Court of Appeals accordingly erred in holding that Indian landowners in the Pueblos have appurtenant water rights superior in priority to the water rights of non-Indian landowners within the Pueblos who, pursuant to acts of Congress, acquired title to Pueblo lands with appurtenant water rights. In reaching this erroneous conclusion with respect to the relative priorities of Indians and non-Indians to water, neither the majority of the Court of Appeals nor the dissenting judge discussed or cited, or apparently even considered, the holding of this Court in *United States v. Powers, supra*. The error of the Court of Appeals on the important matter of priorities as between Indians and non-Indians who claim rights as successors-in-interest to lands having appurtenant water rights is in conflict with the principle of the *Powers* case pursuant to which the members of the Districts claim their proportionate *Winters* doctrine water rights.

II. REASONS FOR GRANTING THE WRIT OF CERTIORARI

The holding of the Court of Appeals respecting the relative priority of Indian and non-Indian owners to water rights, when non-Indians claim title as successors-in-interest to Indians having *Winters* doctrine or similar rights, is squarely contrary to the holding of this Court in *United States v. Powers, supra*. The writ should therefore be granted pursuant to Rule 19(b) of this Court.

In the *Powers* case the United States brought suit on behalf of an irrigation project serving Indians on an Indian reservation against certain successors-in-title to Indian reservation lands who were diverting water upstream from the Indian irrigation project. The defendants who included Indian allottees, non-Indian grantees of Indian allottees, and other non-Indians who acquired title from the United States acting as trustee for deceased Indians were held to have succeeded to *Winters* doctrine water rights appurtenant to their lands. Relief was denied on the ground that the defendants' water rights, being derived from the same source, were equal to the Indians' water rights.

In the instant case, the Court of Appeals recognized that the non-Indian landowners in question obtained title pursuant to statutes of the United States and that they also obtained appurtenant water rights. It is evident that the lands in question were lands within Pueblos to which Indian water rights had attached under the holding of *United States v. Winters, supra*. Under the holding of the *Powers* case, therefore, the non-Indian landowners must be held to have rights equal in priority to water rights appurtenant to lands retained by the Indians.

In addition, the Court of Appeals below so far departed from the acceptable and usual course of judicial proceedings as to warrant exercise of this Court's supervisory power. See Rule 19(b) of this Court.

In the instant case, Chief Judge Payne of the United States District Court for the District of New Mexico issued an interlocutory order, holding that the Pueblos' water rights were governed and delimited by the doctrine of prior appropriation which is generally applic-

able within the State of New Mexico. (A copy of Chief Judge Payne's order, dated December 2, 1974, is attached as Appendix B to the Petition for Writ of Certiorari.) Chief Judge Payne certified this interlocutory order as a controlling question of law pursuant to section 1292(b) of title 28 of the *United States Code*, and thereby permitted an interlocutory appeal. Chief Judge Payne's order did not deal with the question of the relative priorities of Indians and non-Indians, nor did the order deal with the nature or derivation of the non-Indians' water rights. On the contrary, the only question presented by the interlocutory appeal from Chief Judge Payne's order was the soundness of his holding that the Indians' water rights were subject to the doctrine of prior appropriation.

Because of the narrow question that Chief Judge Payne's order presented, the issue of relative priorities between Indians and non-Indians was neither argued nor briefed before the Court of Appeals. Nevertheless, that Court reached the issue. After deciding that Chief Judge Payne had erred in holding that the general doctrine of prior appropriation was applicable, and determining that the Indians enjoyed *Winters* doctrine or similar water rights, the Court of Appeals went beyond the narrow question presented, and, without benefit of argument or citation to controlling authorities, held that the water rights of the Pueblos will in all circumstances be prior to those of non-Indians who acquired title to Pueblo lands from the United States pursuant to an act of Congress.

The Court of Appeals does not anywhere cite the decision of this Court in *United States v. Powers*,

supra. Nor does the Court of Appeals in any way allude to the theory of that case, that is to say, that non-Indians successors-in-interest to Indians or to Indian Tribes obtained from their Indian predecessors the same water rights that such predecessors had, with equal priority.

WHEREFORE, it is respectfully requested that this Court grant the petition for Certiorari and vacate the order of the Court of Appeals insofar as it purports to determine priorities as between Indian and non-Indian owners of Pueblo lands.

Respectfully submitted,

FRANK J. MARTIN, JR.
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Certificate of Service

I hereby certify that on this 9th day of December, 1976, copies of the Motion for Leave to File a Brief Amici Curiae and said Brief were mailed, in accordance with Rule 33 of the Supreme Court of the United States, to all parties required to be served.

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